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No. 1053

In the Supreme Court of the United States

OCTOBER TERM, 1957

HARTE-HANKS NEWSPAPERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 23–30) is not yet reported. The opinion of the District Court is reported at 154 F. Supp. 68.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958 (Pet. 31). The petition for a writ of certiorari was filed on June 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that petitioners' documents had not been obtained through an illegal search and seizure, and that the District

Court therefore had erred in suppressing evidence prior to indictment.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

At the outset of a grand jury investigation of possible antitrust violations in the newspaper industry, petitioners moved to suppress grand jury subpoenas *duces tecum* calling for the production of designated corporate documents. The ground of the motion was that petitioners previously had made the documents available to government representatives "upon the condition that none of them would be used in any manner in the prosecution of any action" against them (R. 7, 24).

At the hearing on the motions McMahon, petitioners' attorney, testified that an agent of the Federal Bureau of Investigation (Horton), accompanied by petitioners' employee Meador, had called at his office and requested that he be permitted to examine certain specified documents (R. 51; see R. 44, 48); and that, in response to his questions, the agent had stated that "he did not know" either "the purpose of

the examination" (R. 51–52) or whether the material requested "was to be used by him [the agent] in furtherance of any criminal prosecution" (R. 52; see R. 46). McMahon "told him that since he did not know * * * [he] wanted his examination to be definitely on condition that what he learned or what he copied or the information that he got from our files * * * were not to be used by him in furtherance of any criminal prosecution" (R. 52). The agent again "stated that he didn't know whether it would be used in that manner or not." McMahon said that he would "appreciate it very much" if the agent would "incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files" (R. 52, 46–47). The agent testified (R. 58–59) that he did not accept any offer to make the documents available upon "any condition or understanding or agreement."

McMahon then advised Meador to permit the agent to see the documents (R. 52). The agent did not obtain the documents, however, until two weeks later, and the letter of transmittal which accompanied them made no reference to the alleged condition (R. 63–66). McMahon testified that, after imposing the condition (R. 52), he had no "further discussions" with any government representative "about this matter" (R. 53), and that he did not seek to reduce the condition to writing (R. 54), apart from his request that the agent "incorporate [it] in [his] report" (R. 52).

The District Court found that the documents covered by the subpoenas "were secured * * * by an agreement with the complainants' attorneys * * * that the

papers should not be used before the grand jury in a criminal case," and that "to use such papers before the grand jury" "would violate not only constitutional provisions, but the very thought of liberty and freedom itself" (R. 32). The court entered an order providing "that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation" (R. 77).

The Court of Appeals for the Fifth Circuit unanimously reversed, holding that "the order was without legal justification" (Pet. 27). Noting that "[i]t is established law that suppression of evidence prior to an indictment shall be considered only when there is a clear and definite showing that constitutional rights have been violated" (p. 29), the court ruled (p. 28) that "it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment."

ARGUMENT

The decision of the Court of Appeals is clearly correct, and there is no occasion for further review by this Court. The court applied the settled rule, not challenged by petitioners, that the "extraordinary sanction" (*United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 796) of suppression of evidence prior to indictment may be utilized "only when there is a clear and definite showing that constitutional rights have been violated" (Pet. 29). See *Biggs* v. *United States*, 246 F. 2d 40, 42 (C. A. 6), certiorari denied,

355 U. S. 922; *Centracchio* v. *Garrity*, 198 F. 2d 382, 387 (C. A. 1), certiorari denied, 344 U. S. 866; *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657, 659 (C. A. 1).

The Court of Appeals correctly ruled (Pet. 28) that "it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment."[1] As the court pointed out (Pet. 29),

> Horton [the FBI agent] entered the premises of appellees with the consent of Meador [petitioners' employee] after having 'phoned for an engagement. Even under appellees' evidence, he made no threats or misrepresentations, employed no stratagems, practiced no concealment, coercion or fraud. He did not seize any records at all. They were delivered to him voluntarily by Meador two weeks after the request was made. Appellees and their attorney knew all the while that they had no assurance from the Government that any condition which might have been imposed would be honored.

In sum, petitioners turned over the records freely and voluntarily, and not as a result of pressure or any other improper action by the FBI agent. The agent made no misrepresentations as to the use to which the documents might be put; on the contrary, petitioners' own witnesses conceded that he repeatedly stated that he did not know what would be done with them. Petitioners' attempt to impose a unilateral

[1] The court noted (Pet. 28) that the motions to suppress had not contended that the evidence had been obtained in violation of the Fourth Amendment.

condition upon the use of the documents—a condition which, the Court of Appeals noted (Pet. 27), the agent "had no authority to agree to"—did not convert this voluntary disclosure into an unlawful search or seizure justifying pre-indictment suppression of evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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